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# Pro Bono

## INFORMATION ABOUT NAMIBIA'S LAW

### COVID VACCINES FOR CHILDREN AND THE LAW ON CONSENT

Vaccinations against COVID-19 are now available for children from the age of 12. But who must consent to being vaccinated – the child, or the child's parent or guardian? The answer can be found in the Child Care and Protection Act 3 of 2015.

#### **Who can give consent to vaccination of a child against COVID-19?**

A child may give consent to a medical intervention (other than surgery) if the child is 14 years of age or older, and the medical practitioner providing the intervention is satisfied that the child has sufficient maturity and mental capacity to understand the benefits, risks and implications of the intervention.

If both of these criteria are satisfied - age 14 or older, and sufficient maturity – then the child has independent decision-making capacity for medical interventions. In the context of COVID-19 vaccinations, this means that a child who satisfies both criteria must be the person to sign the consent form for the vaccination, not the parent.

Consent to a medical intervention on a child may be given by the child's parent or guardian *only if* the child is not competent to give independent consent. If such a child has no parent or guardian, then consent may be given by the child's care-giver in the place of the parent.

The term "medical intervention" is not defined, but it almost certainly covers vaccinations against COVID-19.

One aspect of the procedure which may raise practical problems in the vaccination context is the need for a "medical practitioner" to take responsibility for the assessment of maturity. Nurses are not covered by this term. While medical practitioners may be able to delegate aspects of the assessment to a person with the appropriate knowledge and training, the medical practitioner remains the responsible person in terms of the law.

#### **What happens if a vaccination site refuses to accept consent from a child who is age 14 or older and sufficiently mature, and insists on parental consent?**

If a vaccination site refuses to accept consent from an eligible child, the child or any interested person may speak to the person in charge at the site, inform the Customer Care Office at the nearest District Hospital, phone the Ministry of Health's Public Affairs Office at 061-2032054 or call the COVID-19 toll-free helpline on 0800 100 100 to report the situation. This will allow the Ministry of Health to intervene so that the child can be vaccinated.

### **Can a school require parental consent for COVID-19 vaccination?**

If a school is offering COVID-19 vaccination, it is important for the parents to be informed, in the same way as they would receive information about any special school activity. However, the school should not require the parents of children with independent decision-making capacity to sign a consent form.

### **What if a child who has the capacity to make independent medical decisions refuses to give consent for the vaccination?**

The Child Care and Protection Act allows any person with an interest in the well-being of a child to request the Minister of Gender Equality, Poverty Eradication and Social Welfare to give consent for a medical intervention if the child's refusal is unreasonable. If the Minister refuses to overrule the child's decision, any person with an interest in the well-being of the child may apply to a children's court for consent.

In the context of COVID-19 vaccinations, the Minister would probably consider the situation of the child (such as whether the child is particularly vulnerable to COVID-19 because of some serious chronic illness or condition) as well as listening to the reasons why the child does not want to get vaccinated.

The Public Health COVID-19 Regulations issued under the Public and Environmental Health Act 1 of 2015 currently say that COVID-19 vaccination is voluntary. In light of this statement, it is unlikely that the Minister would overrule a child's refusal to be vaccinated unless there was some very compelling reason to do so.

### **If a child has capacity to make independent medical decisions, can a parent prevent the child from getting vaccinated?**

Suppose that a child with capacity to make independent medical decisions wants the vaccine, but the parent disagrees with this decision. The parent cannot overrule the child and stop the child from getting vaccinated.

The Act does not provide any avenue for a parent to invalidate a child's consent to a medical intervention – presumably on the theory that the medical intervention would not be offered to the child in the first place if the relevant medical personnel viewed it as being harmful.

The theory is easier to understand in the context of husband and wife. Both are able to decide for themselves whether they want to get vaccinated. Neither spouse can prevent the other from exercising an independent choice.

It is important that strong feelings about the COVID-19 vaccination do not lead to insecurity for the child or violence in the home. Anyone in such a situation can call the ChildLine/LifeLine toll-free numbers 116 or 106 or talk to a trusted adult who can help the child get support from a social worker or other professional. For example, schools have lifeskills teachers who are trained to assist in such situations.

### **What happens if the child lacks the capacity to make an independent medical decision, and the parent or guardian refuses consent for the vaccination?**

Any person with an interest in the well-being of the child can request the Minister of Gender Equality, Poverty Eradication and Social Welfare to give consent to a medical intervention where the parent or guardian is unreasonably refusing consent, is incapable of giving consent (such as where the parent or guardian has a severe mental disability or is unconscious), cannot readily be traced or is deceased. If the

Minister refuses consent in any of these instances, any person with an interest in the well-being of the child may apply to a children's court for consent.

For instance, in the context of COVID-19 vaccination, suppose that the parent refuses consent for a 13-year-old child to be vaccinated. In theory, an interested person – such as a social worker or an extended family member – could ask the Minister to overrule this decision on the grounds that the refusal is unreasonable.

Here again, the Minister's decision would probably take into account the child's situation (noting any particular vulnerabilities to COVID-19) as well as the reasons why the parent does not want the child to be vaccinated.

If the Minister did not overrule the refusal of consent, any person with an interest in the well-being of the child could approach the children's court for consent.

The key deciding factor is what would be in the child's best interests.

### **What if the child lacks capacity to consent to a vaccination, and the parent refuses to give consent on the grounds of religious or other beliefs?**

A parent or guardian may *not* withhold consent to a medical intervention that would be in the best interests of a child solely on the grounds of religious or other beliefs, unless there is a medically accepted alternative. This means that a parent cannot impose their own religious or other beliefs on the child unless there is a suitable alternative.

But it could be difficult to enforce this rule in practice. For example, if a school offers a vaccination day and asks parents of children aged 12-13 to sign consent forms, the parent might simply refuse consent without disclosing the reason for their decision.

A child in such a situation who really wants to get vaccinated could approach a trusted adult, who could then request a social worker to take the matter to the Minister.

### **What if the child is too young to act alone, but the child's parents disagree about whether the child should be vaccinated?**

The Child Care and Protection Act does not contain rules about disagreement between parents on a child's health care issues. Decisions about medical interventions will normally be the responsibility of the parent who is the child's guardian.

Married parents are joint custodians and equal guardians. This means that either married parent could sign a valid consent form for a child under age 14 – unless the parents have agreed to a parenting plan that says something different.

If the parents are divorced, then the divorce order may impact the division of responsibility for parenting decisions.

If the parents were never married, one parent will usually have sole custody and guardianship of the child, and it would be this parent who bears responsibility for medical decisions concerning the child. The parent without custody or guardianship would not have a say.

A child living with parents who disagree about COVID-19 vaccination may feel vulnerable or anxious. A child who is distressed by family disagreement on this issue can call the ChildLine/LifeLine toll-free numbers 116 or 106, or speak to a trusted adult to ask for help. This could include asking a healthcare worker to talk to the family about vaccination, or asking a social worker at the Ministry or at the Gender-Based Violence Protection Unit to support the family.

**Where the child has independent decision-making capacity, can the parent be informed of the child's vaccination without the child's consent?**

No, not unless there are some special circumstances. If the child has independent decision-making capacity on medical issues (which, to recap, means being at least age 14 plus having sufficient maturity), then the child is the “patient” who is owed the duty of confidentiality. The ethical guidelines on medical confidentiality apply to a child patient as well as to an adult patient. These guidelines provide only limited exceptions to the duty of confidentiality.

**Acting together**

Where the child has the required age and capacity to act independently, this removes the parent's legal power to make the decision *for* the child – regardless of what form a parent might be asked to sign. All vaccination points should be aware that consent forms signed by parents for children who have passed this threshold are invalid; in these cases, the consent *must* come from the child.

But, while the legal rules set out the framework for decision-making, the ideal situation is for parents and children to support each other in decisions around vaccinations. Children with the requisite age and maturity to make their own medical decisions could be encouraged to discuss the decision with their parents or some other trusted adult. Similarly, where the child is too young to decide, parents should be encouraged to discuss their decision with the child.

The COVID-19 pandemic has been accompanied by a plague of misinformation. We also urge anyone with questions or concerns about vaccine safety or side effects to consult reliable sources of information, such as healthcare personnel at Namibia's Ministry of Health and Social Services.

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